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Nos. 682, 701 and 975 Misc.

In the

Supreme Court of the United States

OCTOBER TERM, 1966.

ANGELO PASSINI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

CHARLES COLE, JESSE COWAN and AMERICO DePIETTO,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

MIKE DE MARO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Petitioners pray that this Court grant rehearing of its orders of January 16, 1967 denying the Petitions for Writ

of Certiorari, and that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in the above entitled cause as prayed in the petitions filed herein on October 14, 19, November 7, 1966.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

SINCE THE FILING OF THE INSTANT PETITION FOR CERTIORARI, THE FOLLOWING HAS OCCURRED, WHICH WE RESPECTFULLY SUBMIT WARRANTS THE COURT'S RECONSIDERATION OF THE INSTANT PETITIONS:

A. In *Hayden* v. *Warden of Maryland Penitentiary,* 363 Fed. (2) 647, it was held that clothing seized from the defendant's home when he was arrested there shortly after the commission of a robbery were "of only evidentiary value," and not subject to a lawful seizure. Hayden is a principle authority relied upon in the instant petition for granting certiorari. Subsequent to the filing of the instant petition, this Court granted certiorari in *Hayden,* (11/7/66), 17 L.Ed. (2) 210, 87 S.Ct. 290, and *Hayden* is now pending before this Court for oral argument and decision. We respectfully submit that the instant petitions, where address books, "of only evidentiary value," were seized, and such seizure was held to be valid by the Seventh Circuit Court of Appeals, is the ideal companion case to *Hayden,* where seized clothing was held by the Fourth Circuit Court of Appeals to be "of only evidentiary value," and not subject to lawful seizure.

B. Nor had this Court decided, when the instant petitions were filed, *Lewis* v. *U.S.,* (12/12/66), 17 L.Ed. (2) 312, in which the Court stated, 17 L.Ed. (2) 312, p. 316, that *"an agent is (not) authorized to conduct a general search for incriminating materials. . ."*

C. At the time the instant petitions for writ of certiorari were filed, this Court had not decided *Hoffa* v. *United States* (12/12/66), 17 L.Ed.(2) 374, 87 S.Ct., in which Mr. Justice Stewart, expressing the views of the majority, stated, (17 L.Ed. (2) 374, 381-382) that, when a citizen, "puts something in his . . . desk drawer . . . he has the right to know it will be secure from an unreasonable search. . . *So it was that the Fourth Amendment could not tolerate the . . . purloining of the petitioner's private papers in Gouled,* (255 U.S. 298)."

D. Mr. Chief Justice Warren, Mr. Justice Fortas and Mr. Justice Brennan were of the opinion that the instant petitions for certiorari should be granted. The above quoted language in *Hoffa* of Mr. Justice Stewart, who did not dissent from the denial of the instant petitions, we submit, fortifies our position in the case at bar. So does the following expression from the dissenting opinion of Mr. Justice Douglas in *Osborn* v. *U.S.*, 17 L.Ed. (2) 394, P. 411, decided December 12, 1966, also after the instant petitions were filed. Mr. Justice Douglas, after quoting from *Boyd* v. *U.S.*, 116 U.S. 616, 29 L.Ed. 746, P. 751, stated:

> *"Today a search that respects all the procedural proprieties of the Fourth Amendment is nonetheless unconstitutional if it is a 'search' for testimonial evidence."* (Italics ours)

Mr. Justice Douglas likewise did not dissent from the denial of the instant petitions for certiorari. The search for and seizure of the address books in the instant case extorted "testimonial evidence," compelled self-incrimination and violated the Fourth and Fifth Amendments. The holding of the Court of Appeals in the instant case is diametrically opposed to, inconsistent with, and repug-

nant to the foregoing expressions and holdings of *Hoffa, Osborn, Lewis* and *Hayden.*

E. Trial Courts are consistently expressing confusion and dubiousness as to this Court's holding in *Dennis* v. *United States,* 16 L.Ed. 2d 973 of a defendant's right to the production and examination of government trial witnesses' grand jury testimony. No ambiguity exists among these writers regarding the Court's holding in *Dennis.* Most assuredly, ambiguity was not the basis for the Second Circuit Court of Appeal's complete disregard of *Dennis* in *U.S.* v. *Ulman,* (decided October 27, 1966, published January 16, 1967,) 368 Fed. 2d 725, 730, after the filing of the instant petitions. Nor was ambiguity the basis for the Seventh Circuit Court of Appeals' failure to follow, distinguish, discuss or cite *Dennis* in the case at bar, a judicial breach, we submit, of extreme magnitude. Perhaps it was the Court of Appeals' ignoring *Dennis,* or the *Dennis* holding itself that induced the lapse of memory of three narcotics agents, as to whether they testified before the Grand Jury, in the trial of *U.S.* v. *Irving Napue,* 66 CR 41, in the United States District Court for the Northern District of Illinois, Eastern Division at Chicago, Illinois on November 28-29, 1963,[1] subsequent to the filing of the instant petitions. Although the Assistant U. S. Attorney informed the trial court that he could determine from the Grand Jury minutes and his office whether they did so testify, (App. A 175, 19, 25) defense counsel's motion that the Court order him to make such determination was overruled, (App. A, pp. 6, 17, 19, 30). The Court expressed a reluctance not to order production of the

[1] This portion of the certified transcript of said trial is submitted herewith as Appendix A. Attorney Pincham on the instant petition was also the Attorney for the defendant, Napue, on said trial.

Grand Jury testimony and suggested to the U. S. Attorney that production was feasible and practical (App. A 30-31). Nevertheless, the Court, in *Napue*, denied defense counsel's motion that the government witness' Grand Jury testimony be produced (App. A, 30). The trial judge was dubious of the defendant's right thereto. This ambiguity, we respectfully submit, should be here rectified and "at the earliest opportunity." *Mesarosh* v. *U.S.*, 1 L.Ed. (2) 1, 9.

F. Again, uncertainty of the *Dennis* holding was clearly expressed by the trial judge in *U.S.* v. *Segaviano, et al.*, No. 66 CR 371, in the U. S. District Court for the Northern District of Illinois, Eastern Division, on trial January 31-February 6, 1967.[2] First, the trial court accused defense counsel of intellectual dishonesty in his interpretation of the *Dennis* holding, (App. B 1-22). Second, the trial court interpreted the *Dennis* holding to be premised on (1) the lapse of time between the alleged offense and the witnesses' trial testimony; (2) that the witnesses were accomplices, rather than police officers; (3) that the charge was a conspiracy; (4) that the witnesses' trial testimony was of conversations with the defendants, rather than acts; and (5) the witnesses admitted some mistakes in their trial testimony (App. B, 15-17). Surely this Court did not intend to confer upon an accused a right premised upon such discriminate factors, none of which the accused could remotely control. And when defense counsel pointed out that none of the aforementioned factors existed in *Worthy* v. *U.S.*, 352 Fed. (2) 718, which this Court remanded, 16 L.Ed. (2)

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[2] This portion of the certified transcript of said proceedings is also submitted herewith as Appendix B. Attorney Pincham was also the defendant, Segaviano's Attorney on said trial.

1000, in the light of *Dennis*, (App. B, 19-20, 24-25), the trial court then agreed that defense counsel's interpretation of the *Dennis* holding was correct, (App. B, 40-42). But upon the Court ordering that the government witnesses' Grand Jury testimony be produced to defense counsel, (App. B, 46), the government objected on the basis of the trial court's subsequent holding in *National Dairy Products Co.* v. *U.S.*, 350 Fed. (2) 321, (App. B, 46-47), after remandment by this Court in the light of *Dennis*, 16 L.Ed. (2) 993. The trial court thereupon again reversed itself and denied defendant's motion for production, (App. B, 59), but subsequently granted it under unwarranted certain restrictions, the portion of which proceedings has not yet been transcribed.

It is respectfully submitted that the foregoing trial court proceedings and expressed ambiguity as to the *Dennis* holding, all of which occurred after the instant petitions for certiorari were filed, warrant this Court in reconsidering the order denying the instant petitions and in allowing the issuance of the writ. We importune this Court so to do. Apparently, clarification of *Dennis* is sorely needed for the benefit of trial courts as well as the Courts of Appeals for the Second and Seventh Circuit.

CONCLUSION

For the reasons set forth above and in the petitions for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

Counsel for Petitioners

CERTIFICATE OF ATTORNEY

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

Counsel for Petitioners